Supreme Court of the United States.

OCTOBER TERM, 1902. No. 117.

GEORGE BLEISTEIN, JOHN W. BRIDGMAN, JOHN A. RUDOLF, ANSLEY WILCOX, GERRITT B. LANSING and EDWIN FLEMING, doing business under the name of THE COURIER COMPANY and THE COURIER LITHOGRAPHING COMPANY *Plaintiffs in Error,*

AGAINST

THE DONALDSON LITHOGRAPHING COMPANY, *Defendant in Error.*

} *At Law.*

BRIEF ON BEHALF OF PLAINTIFFS IN ERROR.

This action comes before the Supreme Court upon writ of error to the Honorable, the Judges of the United States Circuit Court of Appeals for the Sixth Circuit (Record, page 83), which court heard it on writ of error directed to the United States Circuit Court for the District of Kentucky. (Page 20.)

The Circuit Court, at the close of plaintiffs' case, instructed the jury to find a verdict for defendant, which was done and judgment entered thereon. The Circuit Court of Appeals affirmed said judgment.

The action was begun on June 10th, 1899, by filing the declaration (called "petition" in Kentucky) of plaintiffs in error (page 2), alleging that defendant in error had violated three certain copyrights granted to the plaintiffs in error in April, 1898, for three picture-posters or show-bills, described in the declaration as "lithographic prints, cuts or engravings," more accurately *chromo-lithographs*, entitled "Spectacular Ballet Design," "Stirk Family Design" and "Statuary Act Design."

The certificates of copyright are set out in the declaration. (Pages 3, 5 and 6.)

The plaintiffs' three causes of action were all based upon Sec. 4965 of the Revised Statutes, quoted on page 60. By order of the Circuit Court, dated June 10, 1899, the marshal seized 10,590 eight-page prints and 13,205 four-page prints, described in the writ, and also five metal electrotype plates, all of which he found in the defendant's possession. (Page 13.)

The action was tried at Covington, Kentucky, on December 12th and 13th, 1899, before Hon. Walter Evans, sitting as Circuit Judge, and a jury. The testimony and all the proceedings will be found on pages 23 to 59 of the record. The plaintiffs examined six witnesses and introduced numerous exhibits, among them the copyrighted prints and the documents pertaining to the copyrights, and the counterfeits manufactured by the defendant, against which the action was directed.

At the outset of the trial, during the direct examination of the first witness, the court anticipated the question upon which it afterwards took the case away from the jury and decided it, by the following remark. (Page 28):

> "The Court: *The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law.*"

At the close of the plaintiffs' case, defendant moved for "peremptory instructions for the defendant". (Page 58.) The court said, "State why, in a word," to which defendant's counsel answered:

> "Mr. Kittredge: In the first place I want to say with reference to the Statuary Exhibit. * * * It is alleged in the petition, and is in fact copyrighted on the 18th of April, and the publication plainly shows it was prior to that. That is a specific objection to that one upon that ground specifically—that is the Statuary."
>
> "The Court: Now as to the other two."

"Mr. Kittredge: The specific objection to this one, the Ballet, is that it is an immoral picture.

"*And the general objection that I make to them all is that they are none of them subject matter of copyright. They are all mere matter of advertising*". (Page 59.)

The court took a recess, and the next day delivered a written opinion (pages 60 to 66), which concludes as follows:

"The case must turn upon the others (other questions), and especially upon the general proposition that the things copyrighted in this case were by no means such as either the constitution or the legislation of Congress intended to protect by the privilege of copyright. The court cannot bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only the exclusive right to print them, but the additional protection of a penalty of a dollar each for reprints from them.

"As previously stated, they are neither 'pictorial illustrations' nor 'works connected with the fine arts' within the meaning of Section 4952. Not being so, there was no authority to grant the copyrights, whether the constitution authorizes Congress to promote the fine arts or not.

"The judgment of the court is, that the plaintiffs, on their own showing, are not entitled to recover, and for that reason the motion of defendant will be granted, and I will instruct the jury to find a verdict for it."

The jury, in accordance with said instruction, returned a verdict for the defendant. (Page 66.)

The plaintiffs sued out their writ of error in the Circuit Court of Appeals, and after argument an opinion was handed down sustaining the decision of the Circuit Court. (Pages 72 to 77.)

There is no question as to the fact of infringement.

The sheets in evidence, made by defendant, contain reproductions by means of cheap electrotype plates of each of the plaintiffs' designs. These reproductions are not in colors.

The Copyright Law.

We have not printed the sections of the copyright law in this brief because the important sections, R. S. 4952, 4956 and 4965, are printed in the record in the opinion of Judge Evans, on pages 60, 62 and 63. We shall hand to the court copies of an official pamphlet issued by the Librarian of Congress, which contains the whole copyright law in convenient form.

But it should be noted that in quoting Sec. 4956, on page 62 of the record, either the court or the printer has omitted an important clause. In the middle of the section, line 9 from the end of page 62, as printed, after the words "District of Columbia," and before the words "two copies of such copyright book" etc., there should be inserted the clause, "*or deposit in the mail, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia.*"

This makes the copyright date from the mailing of the copies as it does from the mailing of the printed title; and not from their receipt by the Librarian at Washington.

We quote the first part of this section, correctly, as follows, the passage omitted in printing the record, being italicized:

> "Sec. 4956. No person shall be entitled to a copyright unless he shall, on or before the day of publication, in this or any foreign country, deliver at the office of the Librarian of Congress, or deposit in the mail within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia, a printed copy of the title of the book, map, chart, dramatic or musical composition, engraving, cut, print, photograph, or chromo, or a description of the painting, drawing, statue, statuary, or a model or design, for a work of the fine arts, for which he desires a copyright, nor unless he shall also, not later than the day of the publication thereof, in this or any foreign country, deliver at the office of the Librarian of Congress, at Washington, District of Columbia, *or deposit in the mail, within the United States, addressed to the Librarian of Congress, at Washington, District of Columbia,* two copies of such copyright book, map, chart, dramatic or musical composition, engraving, chromo, cut, print, or photograph, or in case of a painting, drawing, statue, statuary, model, or design for a work of the fine arts, a photograph of same."

THE PRINCIPAL QUESTIONS

to be decided by this Honorable Court will be as follows:

First—Whether on the question of artistic merit or value of these lithographic prints or chromos, the Circuit Court was justified in taking the case from the jury, and condemning them entirely as not being fit subjects for copyright.

Second—Whether the copyrights were obtained for these prints in accordance with the constitution and laws of the United States, and are valid copyrights.

The second question involves the inquiries:

(*A*)—Whether the copyrights were properly taken out by the plaintiffs, in their trade names of "*The Courier Co.*" and "*The Courier Lithographing Co.*", and, incidentally, whether plaintiffs have the right to sue in their individual names for infringement of these copyrights; and

(*B*)—Whether the Statuary Act Design was copyrighted before it was published.

If this court should hold that the courts below erred in regarding the three lithographic prints or chromos, the subject matter in suit, as not proper subjects of copyright, or that the trial court erred in taking the case from the jury, the result will be a new trial, at which the opinion of this court will serve as a guide upon these various questions.

THE ASSIGNMENTS OF ERRORS,

Record, pages 79 and 80, are substantially as follows:

I. The Trial Court erred in rejecting evidence offered by the plaintiffs showing, among other things, that two copies of the Statuary Act Design were received at the Librarian's Office on April 11, 1898.

Under sub-heads 2, 3, and 4, this first assignment also points to the refusal of the Circuit Court to receive evidence as to the custom of the trade regarding the relations between the printer and the customer, the refusal of the court to receive evidence that would demonstrate that defendant's copies were line for line reproductions of the copyrighted pictures, and the refusal of the court to permit the relations between the artist and the plaintiffs' company to be demonstrated more clearly.

II. The Trial Court erred in sustaining defendant's motion to charge the jury to find for the defendant, and in so charging the jury.

III. The Trial Court erred in overruling plaintiffs' motion for a new trial.

IV. The Circuit Court of Appeals erred in not reversing the judgment of the Trial Court.

V. The Trial Court and Circuit Court of Appeals erred in holding that the Statuary Act Design was not a proper subject of copyright.

VI. The Trial Court and Circuit Court of Appeals erred in holding that the Stirk Family Design was not a proper subject of copyright.

VII. The Trial Court and Circuit Court of Appeals erred in holding that the Spectacular Ballet Design was not a proper subject of copyright.

ARGUMENT.

GENERAL FEATURES OF THE CASE.

The three pictures in question are show-bills or circus bills, also called posters and, more definitely, *picture-posters*. They are colored lithographs or chromo-lithographs, commonly called "chromos." They were designed primarily to be sold to the proprietors of circuses and other shows, and by them to be used for advertising; but they could be sold to any one, or used for any purpose for which they were adapted.

They were made in the plaintiff's lithographing establishment under a special contract with Mr. Wallace, proprietor of the Wallace Circus, by which the plaintiffs agreed to design and get up certain representations of scenes supposed to be exhibited at the Wallace show, the plaintiffs reserving rights of design and of copyright, and with the usual understanding that so long as Wallace used these designs he had the right to them, but if he ceased to use any of them the plaintiffs could sell the design or the pictures which embodied it, to any one. Wallace or his agent simply told the plaintiffs that they were to have a grand ballet, some statuary acts representing certain scenes, and some trick bicycle riding, giving more or less details, and from this information the plaintiffs were required to and did get up these designs and create the pictures. (The evidence on these points will be referred to and quoted later.)

The resulting show-bills or posters are good specimens of that class of work, much above the average of the show-bills produced in the numerous and extensive lithographing establishments of the country. They were printed in various sizes, some very large, to be posted on bill-boards, and others of moderate size, like the exhibits which will be shown to the court, intended to be hung in windows and called "window work."

The "*Spectacular Ballet*" represents the chorus of a large ballet as customarily represented in grand opera, but somewhat idealized, with three principal performers in the center—a brilliant and striking group of figures in the conventional Italian ballet dress. The "*Statuary Act*" design exhibits a number of tableaux of historic and mythical events—"Landing of Columbus", "Apollo and Muses", "Triumph of Love", "Rock of Ages", and "Offering to Cupid." All of these are graceful and pleasing conceptions, skillfully grouped and colored with great taste. The "*Stirk Family*" picture represents a family of expert bicycle riders, engaged in fancy riding. This subject did not admit of such artistic treatment as the others, but, considering the subject, the artist has certainly produced a very attractive and distinctly original poster.

Reduced copies of these pictures will be handed to the court with this brief.

It will be seen that the fundamental question of the right to copyright such show-bills or posters, is a question of great importance, involving the protection of an immense industry.

If the proprietors of the lithographic establishments of the country cannot copyright and protect their designs for posters and show-bills, but these can be pirated and copied by cheaper competitors, then the entire lithographic business will have to be reconstructed, much capital which is now invested will be destroyed, the inducement to get up original and artistic designs will be at an end, and this great business, which has been steadily improving in the artistic quality of its productions, will surely deteriorate, and will have to be run on what may be described as a cheap and nasty basis.

The foundation of the copyright law is in the provision of the constitution (art. 1, sec. 8), which authorizes Congress—

> "To promote the progress of science and *useful arts*, by securing for limited times, to authors and inventors, the exclusive right to their respective writings and discoveries."

It is settled that the words "authors" and "writings", in this section, are not confined to literary writers and their works, but include, among others, *designers, engravers and lithographers*, as well as photographers.

> *Burrow-Giles Litho. Co. v. Sarony*, 111 *U. S.* 53.
> *Trade Mark Cases*, 100 *U. S.* 82.

We may anticipate our argument by pointing out that engraving, and especially engraving on stones or lithography, is surely a "*useful art*", and that its protection and promotion by means of copyrights has been one of the main objects aimed at by Congress in all of the copyright legislation, beginning with the first act, of May 31, 1790.

It is also proper, at this point, to call attention to the well-known *purposes and the necessary limitations of picture-posters* or show bills, such as these chromo-lithographs were. They are not designed for close inspection or long-continued study, like an oil painting, a steel or wood engraving, or an etching, and they are not to be judged by the same standards. They are intended to catch the eye of the passer on the street, or anyone who merely glances at them, and to challenge his attention,—if possible to compel him to look again, so that he will observe what is the subject of the poster and have this forced upon his mind, and will be attracted by it. Their function is to illustrate something, and to advertise it by appealing quickly to the imagination, and conveying instantly a strong and favorable impression. Thus, to be successful, they require artistic ability, and above all things creativeness or originality of a high order, but peculiar. They must be designed boldly, and executed on

broad lines, with not much attention to detail, so that the spirit of the picture will stand out at once, and almost leap at you, and will not be lost in a mass of details and minor features.

Such, as we understand, is the ideal picture-poster, a special and peculiar branch of pictorial art, and one into which many gifted artists, highly successful in other fields, have ventured with greater or less success.

An excellent view of the scope and purposes of the picture-poster is given in the work of Charles Hiatt, entitled "*Picture Posters*", published in 1895 by George Bell & Sons, London; also in "*The Modern Poster*", by Alexandre and others, published in 1895 by Charles Scribner's Sons. Indeed there is quite a body of valuable and interesting poster literature which has grown up within recent years, and poster exhibitions are frequently held in all large cities.

In *Appendix A (end of brief)* we quote some paragraphs from the opening chapters of Mr. Hiatt's book, and mention a few of the celebrated artists who have produced posters, for use as artistic advertisements. We also refer to the reproductions of certain posters which appear in the Scribners' book, on pages 80, 81, 83, 88, 90.

Another feature should be mentioned in this connection. The picture-poster or show-bill cannot be an expensive or elaborately worked out chromo-lithograph, such as those which closely imitate the fineness of oil paintings and are produced by using from ten to twenty different stones, each printing a color on different parts of the same sheet. Such elaborate chromos are barred on account of the great expense, and moreover they would not produce the quick and startling effect, the instant impression on a mere passer-by, which a poster aims at. The posters in ordinary use are made by using three or four, or, at the most, five stones, on which the colors are spread broadly. The pictures in question in this case are what are called four-

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color work, and it is quite wonderful what a variety of soft tints and shades can be produced by the use of these four colors put on the stones so that they will be superimposed on one another in the printing.

Such pictures are necessarily cheap; they are sold in large quantities to be scattered broadcast, and only do service for a few days at the most. But the fact that they are thus cheaply printed, and on common paper, does not make it any less possible or less necessary to have real artistic merit in the design; on the contrary, it is the more needful to have an original and meritorious and striking design. The same design, if worked out with the detail of a ten-color chromo and printed on good paper, would produce a much finer result upon a critical examination.

As already stated, the purpose of such posters is to attract the public, to please them, and to make them want to see or to possess the thing depicted or illustrated. They appeal to the tastes and imagination of people as they are; but they can be made to serve a useful purpose by gradually educating and refining the public taste, or they can serve to degrade and pervert it. The former tendency will be promoted by protecting such advertising pictures through the copyright law; the latter by throwing down the safeguards of copyright, and allowing piracy of original and expensive designs.

But under such circumstances it is clear that the value of such posters is in their attracting or drawing power. If they illustrate and advertise a show, their value is proved practically by the number of people they bring to that show. So in the case of such posters, the test of the "box-office receipts", spoken of in some of the copyright decisions, becomes an absolute test of the practical success and value of the picture. And if such pictures, after being used for a season, are stolen and copied by others to be used in like manner, this strongly tends to prove their value for the purposes for which they were designed.

Certainly it does not lie in the mouth of the pirate, who has stolen and copied them at some expense and considerable risk, to deny that they have merit and value.

This general statement of facts and features of the case, which we believe will not and can not be disputed, prepares the way for the following points.

POINT I.

THE DESIGNS WERE PROPER SUBJECTS OF COPYRIGHT.

We respectfully but earnestly contend that each of these picture-posters was a proper subject of copyright, within the language and the spirit of the copyright law. There was abundant evidence of originality of design, of artistic merit, and of practical value and usefulness, as to each of the pictures.

If any of these qualities was seriously questioned by the defense, it became the duty of the court to send the case to the jury.

As a matter of fact, no one of these qualities was questioned by the defense in any way. They were not questioned by the answer, but as that was a general denial it would probably cover any such point without indicating it; but no such question was raised by the offer of any proof, nor even by the motion for a nonsuit or "peremptory instructions," as it was called.

The court injected this question into the case at an early stage, as has been mentioned, by its remark: "The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law" (page 28); but this lead was

never taken up or followed by defendant's counsel. When he moved for peremptory instructions, and was asked to state his reasons, he first objected specially to the Statuary Act on the ground that, as he claimed (erroneously), it had been published before it was copyrighted, and next specifically to the Ballet as being "an immoral picture"; and then said (page 59):

> "And the general objection that I make to them all is that they are none of them subject matter of copyright. *They are all mere matter of advertising.*"

This objection did not even suggest any lack of originality, or creative design, or artistic value in the pictures, but only raised the point, which is quite untenable, that pictures designed to be sold for advertising purposes cannot be copyrighted.

So it is literally true that the Trial Court granted a nonsuit and instructions against the plaintiffs on grounds which were not raised by the defense, and were not used by the defense even after the court had suggested them.

The Trial Judge in his written opinion granting the nonsuit, as shown by his conclusions already quoted, did not adopt the contention of the defendant that these pictures were not proper subjects of copyright because they were designed to be sold for advertising circuses and other shows; but *he assumed to condemn all of them as being such poor pictures that they were not copyrightable.* He said (page 66):

> "The court cannot bring its mind to yield to the conclusion that such tawdry pictures as these were ever meant to be given the enormous protection of not only exclusive right to print them, but * * * a penalty of a dollar each for reprints from them. As previously stated, they are neither 'pictorial illustrations' nor 'works connected with the fine arts' within the meaning of Section 4952. Not being so, there was no authority to grant the copyrights, whether the constitution authorizes Congress to promote the fine arts or not."

But the Trial Judge did not question the fact that these pictures were original designs, created by the plaintiffs or their employees. On the contrary, he said (page 61):

> "Each of the engravings *was designed* and engraved at Buffalo, N. Y., and at least one of them by an employee of the plaintiffs, the Courier Company, and all were designed for use as show-bills, and as advertisements for the Wallace Circus."

In truth, the original designing of these pictures had been clearly proved in sweeping terms by the plaintiffs' first witness, Mr. Bleistein, in answer to a rather trying series of questions first put to him by the Trial Judge himself. (Pages 33, 34, 35, 38.) Mr. Bleistein testified:

> "In our contract with Mr. Wallace, and with all the shows, we simply agree to furnish a stated amount of paper, whether it is old or new, for a certain amount of money per sheet. We reserve rights of design, that we put in our copyright. We copyright that with the simple view that as long as Mr. Wallace uses that, he has the right to use it; but if he ceases to use that bill—say he does not do the Statuary Act next year—we have the right with that design to sell to other people who may want to use that sort of thing". (Page 34.)

He further stated that these pictures were "designed by the Courier Company, by our man * * * a man named August Bandlow" (page 33); that the plaintiffs became proprietors of the design "*by having it made by one of our men, his original own idea * * * he designed that.* We engage his talents. We pay for his talents" (page 34). And again, as to another of the pictures: "*He was the author and designer of that. We engage his talents, and what he produces belongs to us.* * * * *Q. Who designed those three? A. Mr. Bandlow*". (Page 35.)

> "The Court: Let him state what the agreement was?
>
> "The Witness: My agreement with Mr. Bandlow is that he was to receive while in our employ $100 a week as designer. He was to furnish us with such designs as we needed, and they were to be our property; for consideration of that he was to receive $100 per week". (Page 36.)

Incidentally, this shows that Mr. Bandlow was regarded as an artist of ability and whose work was of value. He was paid over $5,000 a year.

In regard to the purposes of the pictures and the sources from which the plaintiffs got their instructions as to making them, Mr. Bleistein on cross-examination testified as follows (end of page 37):

"By Mr. Kittredge (cross-examination):

"Q. Who informed you, or furnished information to you concerning that, that was what they intended to exhibit to the public, that they intended to present a ballet of that kind?

"A. Mr. Wallace simply wanted us to get up a—

"Q. Now, answer my question. Who informed you?

"A. I am trying to do that.

"Q. Answer my question. It is a simple question; who informed you that that was—that they intended to present a ballet of that character?

"A. Mr. Wallace or his agent informed us that they were going to present a ballet. Whether it was just of that character or not, I don't know.

"Q. Who informed you that they were going to present the scene of the bicycle performance?

"A. Mr. Wallace or his agent, I dare say.

"Q. Who informed you that they intended to present these statuary pictures as a performance in their circus?

"A. Mr. Wallace, or his agent, I dare say; *not that they were to have these very same things. They were left to us to design.*

"By Mr. Helm (redirect examination):

"Q. I want to ask you this, Mr. Bleistein—were these engravings or these drawings made from descriptions given you by Mr. Wallace's show, or any employee of that show, or were they the creation of your employees?

"A. They were the creation of our employees, principally.

"Q. Take the ballet matter; was that principally, or was it not entirely, your creation?

"A. Entirely". (Page 38.)

In view of this evidence, which had just been given, and was not only undisputed but even unquestioned by the defense, the

Trial Judge could not and did not question the original designing or creation of any of the pictures involved in this case; but he assumed authority, which we think was unwarranted, to pass on the facts at that preliminary stage and take them away from the jury, and undertook to condemn all the pictures as being utterly without merit, and so uncopyrightable. There is some confusion in his decision growing out of the discussion of minor points—none of them actually important; and owing to the doubt, which was evidently working in his mind, whether Congress was really authorized by the constitution to pass a copyright law protecting works of the *fine arts* as such, and his attempt to distinguish the fine arts from the "*useful arts*," referred to in the constitution; and particularly owing to his attempt to construe Sec. 3 of the Act of June 18, 1874.

But at the close of the opinion he substantially brushed aside every other question and came down to the proposition with which he had plainly started off—that the copyright law was not intended to and did not protect ordinary posters like those before him, which he stigmatized as "cheap show-bills" and "tawdry pictures", even though they were based upon really original designs.

It appears clearly that the Trial Judge was alarmed and repelled by the "enormous penalties" provided for by the statute, which he mentions twice in his opinion (page 64, first paragraph, and page 66, as above quoted); and that he practically reached his decision by attempting to measure up this penalty of one dollar for each sheet seized against the comparatively small value of the individual sheets as produced by the infringing defendant, or even by the plaintiffs. In so doing he disregarded the principle involved, which would have been the same whether the marshal had seized one sheet or ten thousand; he forgot the right of the plaintiffs to have the copyrights for their original designs sustained under the statute, even if this cost the defendant smartly, and even

though the pictures made from their designs were in a certain sense cheap show-bills, and he ignored the fact that one-half of the penalties go to the United States Government, and not to the plaintiffs; and, finally, he forgot that he was not the Congress, exercising its constitutional power to legislate for the protection of authors and inventors, including artists, by copyrights—as he also forgot that he was not the jury authorized by the constitution to pass upon the facts. So forgetting, the Circuit Judge assumed the powers of Congress to remake the copyright law, as well as the powers of the jury to decide the facts. *Note* *.

Note—As to the Statutory Penalties.*

We are not called upon to defend the policy of Congress in fixing the penalties for infringements of copyrights.

Perhaps in view of the cheapening of photographs and lithographs and other similar prints, it may be proper for Congress to undertake another revision of these penalties; but this is not a question with which either counsel or the court has anything to do.

It is proper, however, to call attention to the fact that this precise subject has been before Congress recently, and in the year 1895 it revised Sec. 4965, prescribing the penalty for infringements of copyright. The penalty had previously been one dollar for every sheet found in the possession of the infringer, without limit. By the act of March 2, 1895, chap. 194 (28 Stat. at Large, page 965), Congress added the *proviso* that for infringement of the copyright of an ordinary photograph, the sum to be recovered in any action should be not less than $100, nor more than $5,000, and "in case of any such infringement of the copyright of a painting, drawing, statue, *engraving*, etching, *print*, or model or design for a work of the fine arts, or a photograph of a work of the fine arts, the sum to be recovered in any action brought through the provisions of this section shall be not less than $250, and not more than $10,000,"—one-half of the penalties to go to the proprietors of the copyright and the other half to the use of the United States.

By this amendment Congress evidently intended to place a reasonable minimum and maximum amount upon the penalties in all cases.

The Circuit Court of Appeals, in its opinion affirming the judgment, seemed to question both the originality of design and the artistic merit of these pictures. In the opinion written by Judge Lurton, the fact is stated:

> "Plaintiffs' evidence also tended to show that the 'design' or 'conception' was that of an employee working under a salary for them, and that his 'designs' were the property of the employer, and therefore copyrighted by them". (Page 73.)

Later he states the facts, quite erroneously, as we think, as follows:

> "There was no evidence touching the originality of any of these designs other than the general statement of one of the plaintiffs that Mr. Wallace represented that these acts were to be done in his show, and that the designs as copyrighted were 'the creations of our employees' ". (Page 74.)

Coming to the discussion of the facts as previously stated in his opinion, Judge Lurton begins as follows:

> "The copyrighted chromos or prints were designed to be pictorial representations of acts done in the Wallace Circus. That they were designed and intended for advertising purposes only is undisputable. They may be 'creations' in the sense that they are not exact reproductions of the acts they advertise. *But that the arrangement, pose, color, grouping or expression is new or original does not appear in the evidence, nor can we assume it from an examination of the prints themselves.* Aside from this function as advertisements, we are unable to discover that they have any use whatever, or that they have any intrinsic merit or value.
>
> "But they are 'chromos' or 'prints', and chromos and prints are included in the list of productions which, under the statute, may be copyrighted. But are all chromos and prints unqualifiedly entitled to the protection of the copyright law? Must such a construction be given the statute?" (Page 74.)

After citations from a few of the authorities the opinion declines to hold in favor of the contention of the defense, that

these pictures were barred from copyright because they were intended to be sold and used for advertising purposes. It states:

> "The exigencies of the case in hand do not require that we should express any opinion upon the broad subject.
>
> "It may be that a picture, or lithograph, or engraving, though intended to be reproduced in prints and used as an advertisement, is entitled to the protection of the copyright law, notwithstanding the use for which it is designed". (Page 76.)

Finally, the opinion of the Circuit Court of Appeals concludes:

> "*What we hold is this*, that if a chromo, lithograph or other print, engraving or picture, has no other use than that of a mere advertisement, and no value aside from this function, it would not be promotive of the 'useful arts', within the meaning of the constitutional provision to protect the 'author' in the exclusive use thereof, and the copyright statute should not be construed as including such a publication, if any other construction is admissible.
>
> "If a *mere label*, simply designating or describing an article to which it is attached, and which has no value separated from the article, does not come within the constitutional clause upon the subject of copyright,*

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*Note**—This is, of course, an inadequate statement of *the law in relation to labels.*

While it is true that a mere label, which simply designates or describes the article to which it is attached, and has no value separated from the article, such as a mere name or descriptive title, is not copyrightable, because it involves no invention, no authorship; yet labels which are original designs and do involve authorship, are entitled to protection, and may be copyrighted by the express terms of the statute. (Act of June 18, 1874.) But the statute, for convenience, says that this must be done by registering them in the Patent Office, not by depositing the title and filing copies in the Office of the Librarian of Congress, as in other copyrights.

This is shown by the very case cited by the Circuit Court of Appeals. (*Higgins vs. Keuffel*, 30 *Fed. Rep.* 627; 140 *U. S.* 428 See also, *Marsh vs. Warren, Fed. Cases, No.* 9121.)

it must follow that a pictorial illustration designed and useful only as an advertisement, and having no intrinsic value other than its function as an advertisement, must be equally without the obvious meaning of the constitution. It must have some connection with the fine arts to give it intrinsic value, and that it shall have is the meaning which we attach to the act of June 18, 1874, amending the provisions of the copyright law.

"We are unable to discover anything useful or meritorious in the design copyrighted by the plaintiffs in error other than as an advertisement of acts to be done or exhibited to the public in Wallace's show. No evidence aside from the deductions which are to be drawn from the prints themselves was offered to show that these designs had any original artistic qualities. The jury could not reasonably have found merit or value aside from the purely business object of advertising a show, and the instruction to find for the defendant was not error". (Pages 76, 77.)

These quotations present, clearly and fully, the bases of the decisions of the courts below.

Further argument on the merits naturally divides itself into two inquiries:

(*First*)—Are these pictures, or any of them, new and original designs, involving new and original conceptions and creations; and was there sufficient evidence on this question to require the case to be submitted to the jury?

(*Second*)—Assuming that they are new and original, are the pictures, or any of them, of sufficient artistic merit or of sufficient use or value for any legitimate purpose, to be entitled to copyright within the decisions construing the copyright law; and was there sufficient evidence on this question to require the case to be submitted to the jury, or was the court justified in granting a nonsuit and deciding it adversely to the plaintiffs?

(**FIRST**)—*As to Originality of Design.*

We maintain that these pictures, and all of them, are new and original designs; that they involve new and original conceptions and creations.

Certainly there was enough evidence on th subject to require the case to be submitted to the jury if any question was raised about it,—though we think, as already stated, that no such question was raised.

The Circuit Court of Appeals, after stating the question in regard to the copyright law as above quoted from page 74 of its opinion, proceeds to quote the *Trade-mark Cases*, 100 *U. S.* 82, where the Supreme Court, speaking through Mr. Justice Miller, held that:

> "While the word 'writings' may be liberally construed, as it has been, to include original designs, for engravings, prints, etc., it is only such as are *original* and are founded in the creative powers of the mind. The writings which are to be protected are the *fruits of intellectual labor* embodied in the form of books, prints, engravings, and the like."

So in the case of *Lithograph Co. vs. Sarony*, 111 *U. S.* 53, the Supreme Court mentioned with approval the claim that:

> "An engraving, a painting, a print, does embody the intellectual conception of its author, in which there is novelty, invention, originality, and therefore comes within the purpose of the constitution in securing its exclusive use or sale to its author."

And the court substantially adopted the definition of *author* by Lord Justice Cotton, in *Nottage vs. Jackson*, 11 *Q. B. Div.* 627, where he said:

> "In my opinion 'author' involves originating, making, producing, as the inventor or master mind, the thing which is to be protected, whether it be a drawing or a painting or a photograph."

This court, in the *Sarony Case*, further referred to the special necessity of making proof of the facts of originality and intellectual production, in a suit for violation of copyright.

As to *what degree of originality*, invention or creation, is required to be shown, the *Sarony Case* is an important authority. This was a suit for infringement of copyright in a photographic picture of one Oscar Wilde, and the court said:

> "The third finding says that it is a useful, new, harmonious, characteristic and graceful picture, and that plaintiff made the same * * * entirely from his own original mental conception, to which he gave visible form by posing the said Oscar Wilde in front of the camera, selecting and arranging the costume, draperies, and other various accessories in said photograph, arranging the subject so as to present graceful outlines, arranging and disposing the light and shade, suggesting and evoking the desired expression, and from such disposition, arrangement or representation made entirely by plaintiff, he produced the picture in suit.
>
> "These findings we think show this photograph to be an original work of art, the product of plaintiff's intellectual invention, of which plaintiff is the author."

This decision has been followed in many subsequent cases and has laid the foundation for the protection of many photographs for which valid copyrights have been obtained.

As shown by the *Sarony Case*, the degree of originality required to entitle a literary or artistic production to the protection of copyright, is not great. Upon similar lines of reasoning the cases uniformly hold that an article to be capable of copyright must exhibit in some degree "the fruits of intellectual labor, embodied in the form of books, prints, engravings, and the like." But until the decision of the case now at bar, we believe that the courts have uniformly disclaimed the right to act as literary or artistic critics, in passing upon the degree of originality or of merit which is shown.

The former decisions go no further than to hold that the article produced must be of such a character as to admit of intellectual or artistic treatment, and must be sufficiently complete to be useful and valuable in itself. If this appears, and if some one proves that he produced it, then he is entitled to a copyright.

In *Brightly vs. Littleton*, 37 *Fed. Rep.* 103, the court said:

> "The matter must be original and possess some possible utility. The originality, however, may be of the lowest order, and the utility barely perceptible."

In *Carlisle vs. Colusa County*, 57 *Fed. Rep.* 979, the court said:

> "The degree of merit of the copyrighted matter the law is not concerned with. Any is legally enough. To use it or not use it, is voluntary on the part of the public."

In *Drury vs. Ewing, Fed. Cases, No.* 4095, the court said:

> "It is clearly no objection to the validity of her copyright, that her production does not claim a standing as a work of great literary merit. The statute does not make this a necessary element of a legal copyright, and it is well known that there are works of great practical utility, having no pretensions to literary merit, which are yet within not only the words, but the scope and design of the statute."

How can it be claimed that there is in this case any lack of proof of originality or novelty in these designs for lithographic engravings, within the rules laid down by these cases? We should say that it was not possible, except for the fact that the decision has been against us, and, to some extent, in the Court of Appeals at least, upon this ground.

We have already quoted (pages 14, 15) the evidence of Mr. Bleistein on this subject, and have also quoted from the opinion of the Circuit Court of Appeals, from which it can be seen how that court understated the evidence (page 18). Mr. Bleistein did say, as Judge Lurton's opinion states, that these designs were "the creations of our employees," and this alone

should be sufficient; but he said more than this. He also said, as to one of the designs, that it was "*made by one of our men, his original own idea;*" that Mr. Wallace or his agents only gave them a general suggestion of the pictures and "*they were left to us to design;*" that the Ballet picture, particularly, was "*entirely our creation,*" and more to the same effect.

Under these proofs it would seem that there was at least sufficient evidence of originality to take this question to the jury. The grouping, the posing, the costumes and draperies were all designed by the plaintiffs, or by their artist. He had not seen the ballet; he was merely told to produce his conception of a ballet and did so. He had not seen the statuary acts; he was told to produce in the form of an engraving his conception of the Landing of Columbus, of Apollo and the Muses, of the Rock of Ages, of the Triumph of Love, etc. And so with regard to the bicycle display, the Stirk Family Design—he was given and was obliged to exercise the free right to arrange, group, pose, color, and give expression.

The act of the photographer, who merely places his subject in front of the camera, and, as this court held in the *Sarony Case*, exercises his "original mental conception" by arranging or selecting the costume, disposing the light and shade, suggesting and evoking the desired expression, requires far less artistic originality, than does that of the artist who designs the expressions, groupings, costumes, coloring, shading and general harmony of the copyrighted pictures here in question.

We therefore maintain that the courts below erred in so far as they denied or questioned originality and novelty in the copyrighted pictures. This was shown affirmatively by the evidence, and the court was not asked to assume it or left in any doubt about it.

Of course if any one of the pictures was sufficiently proved to be new and original, this was enough to carry the case to the jury upon this question; but we claim that they were all proved to be new and original.

(**SECOND**)—*As to Artistic Merit and Value.*

The pictures being original designs, we maintain that they are of sufficient artistic merit and of sufficient value and usefulness to be entitled to copyright.

At least there was enough evidence of this to require the case to be submitted to the jury, if any question was raised about it,—and again we say that no such question was raised by the defense.

The view which the Circuit Court and the Circuit Court of Appeals took of this question is shown by the quotations from their opinions already made: and the previous statements and discussion in this brief have anticipated some of our arguments on this point, and our reasons for believing that both of these learned courts fell into palpable error.

The Circuit Court called the pictures "cheap show-bills" (page 64), and again "tawdry pictures" (page 66), whose value was disproportionate to the large penalties for infringement prescribed by the copyright law. We have stated that the pictures were intended for use as show-bills or posters, and that the copies produced in evidence were cheaply printed and on common paper, as show-bills and posters usually are. So in this sense it may be correct to call them "cheap show-bills"; but the design was not a cheap one, as is shown by the evidence that the artist who made it was paid at the rate of $100. per week. Whether or not they were "tawdry pictures" may fairly be said to be a matter of taste. To a New England Puritan of the seventeenth century, they probably would be that or worse; to an art critic who can see nothing good in any production of art except what is classical or modern pre-Raphaelite, the phrase "tawdry pictures" would probably be too mild a condemnation of these or any other posters or show-bills. If

our courts in construing the copyright law are to adopt the standards of New England Puritanism of two hundred years ago or of hypercritical art censors, there will be few works found of sufficient artistic merit to deserve the protection of copyright. But this is absurd, and need not be discussed seriously.

The Circuit Court of Appeals did not indulge in epithets, like the Trial Court, but it said of these pictures:

> "Aside from this function as advertisements, we are unable to discover that they have any use whatever, or that they have any intrinsic merit or value". (Page 74.)

We are unable to imagine what standard the learned judges of the Circuit Court of Appeals thought should be applied to posters and show-bills, in adopting this statement as their conclusion upon a serious question of law, involving important principles and large industrial interests.

The fact that the pictures were original designs has been clearly shown, although the Circuit Court of Appeals seemed in some doubt about this; that they were designed by an artist of standing, and whose services commanded a high salary, was shown; that they were brilliant and striking representations of the scenes they were intended to depict, such as would surely attract the eye and command the attention of the public, in spite of the cheap materials with which they were reproduced, was obvious from a mere inspection of the pictures themselves,—and this, as we have pointed out, requires artistic ability of no mean order; that they were valuable and useful for the purpose of illustrating and advertising these scenes is conceded by the court itself in the statement just quoted, and was fully demonstrated by the fact that Mr. Wallace desired them reproduced the next year, and that they were stolen and copied by the defendant, although he knew that they were copyrighted, and although he did not question the validity of the copyrights.

If these facts do not show artistic merit and value, as well as practical utility, we are at a loss to know what the court would expect. Certainly if these facts do not show these qualities in a sufficient degree to sustain copyrights, it follows that no posters or show-bills or ordinary chromo-lithographs can be copyrighted. The very fact which is stated by the court, that they had value as illustrations and advertisements of scenes in Wallace's Circus, shows that they possessed strength and artistic merit. They would not be of much use as advertisements of a show unless they pleased and attracted the public, and it takes artistic work and real merit to do this.

If such facts as these are not sufficient to show artistic merit and value,—if they do not make at least *prima facie* proof requiring the denial of a nonsuit, then we beg this court to instruct us and the profession at large what kind of proof is required in these cases. When the Circuit Court of Appeals commented upon the supposed absence of affirmative evidence of artistic merit, did it have in mind that *the plaintiffs might have called experts* to prove, by opinion testimony, that the pictures were artistic designs and had value?

Such expert testimony is the only distinct kind of evidence which could have been supplied and was omitted. If the Trial Court had wanted it and called attention to its absence, it could have been supplied instantly, because both Mr. Bleistein and Mr. Rudolf, who were present as witnesses, are men of large experience and critical judgment in such matters, although not themselves artists.

But we do not believe that either of the courts below intended to hold, or that this court will hold, that expert testimony is essential to prove the artistic qualities of ordinary pictures such as these. It may be admissible, and it may in some cases be desirable; but it cannot be so essential that without it the plaintiffs' case will necessarily fail even to reach the jury. It occurs to us that formal expert testimony to the effect that

such prints are or are not artistic and meritorious designs would be almost ridiculous and is quite unnecessary. A jury composed of intelligent men, having the pictures before them, and the facts connected with their designing, their successful use, and the desire for their reproduction which resulted in the piracy, must be quite capable of passing on the facts without the aid of professed experts.

More than this, we assert that the pictures themselves furnish sufficient evidence—indeed that they are the *best evidence* —that they are of such a character as to admit of intellectual and artistic treatment. If so, and if proved, as they were, to be original works, they would be entitled to copyright as matter of law.

It must always be remembered that the Trial Court did not give the jury a chance to pass on this question, but disposed of it by a nonsuit. The defendant had not raised any such question,—certainly not by the motion for a nonsuit or peremptory instructions, as we have pointed out.

Moreover when the marshal, with Mr. Rudolf, one of the plaintiffs, went to seize the prints in defendant's possession, it appears by Mr. Rudolf's testimony that Mr. Donaldson, president of the defendant company, did not claim any right to copy the plaintiffs' designs, but the contrary. Mr. Rudolf testified (pages 44 and 45):

> "Mr. Donaldson showed me one of his Ballet designs, and asked me whether I considered it an infringement of my design. I told him I was not answering those kinds of questions; and he further told me that *he knew that we had a copyrighted design of the Ballet bill*, that we had made for Wallace, and which he gave to his artists *so that they would not copy our designs.*"

The marshal, Mr. Compton, testified that he could not remember whether Mr. Donaldson, on the same occasion, said anything to him as to his knowledge of these designs being copy-

righted, but he added: *"I believe he said to me, though, that they were not infringements."* (Page 47).

These remarks show that the defendant had no idea of questioning the copyrightable qualities of plaintiffs' pictures. They simply took their chances, recklessly, in appropriating designs, as they and many others had done before.

In fact the defendant company could not question the merit or value of plaintiffs' pictures, after it had taken the trouble and risk of appropriating and copying them.

The fact that it did this, to supply Mr. Wallace's order for some more advertising matter, is regarded as good and sufficient evidence that, in the eyes of both producers and purchasers of circus posters, these prints are meritorious and valuable.

> *"If it (a copyrighted article) has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection."*
>
> *Drone on Copyright, page* 212, cited with approval in *Henderson vs. Tompkins*, 60 *Fed. Rep.* 758, *at page* 765.
>
> See also, *Church vs. Linton*, 25 *Ont. Rep.* 121.

There was at least a question of fact for the jury.

It was the Trial Court, as we have already shown, which invented the question whether the plaintiffs' designs were properly copyrightable, and then decided that question out of hand by granting the nonsuit. We submit that this, in any view, was wholly unjustifiable. Suppose the Trial Judge had deemed these pictures to be original works, of great artistic value, would he have been justified in taking this question from the jury and ordering a verdict for the plaintiffs; and if he had done so, would such a verdict stand? This question admits of only one answer; but it is the same answer which should be made to the question, Can the present verdict stand?

In a very similar case, involving the same class of illustrations or theatrical posters, the Circuit Court for the Southern

District of New York expressed the opinion that it was a question for the jury whether such pictures have intrinsic merit or value.

We refer to the recent case of *Hegeman vs. Springer*, reported on affirmance by the Circuit Court of Appeals, in 110 *Fed. Rep., page* 374.

On the trial of this case, Judge Lacombe submitted to the jury, in a luminous charge, the question of fact whether a theatrical poster intended to advertise the show called the "Black Crook", was a proper subject of copyright. He said:

> *"The only real question for you to pass upon is whether Exhibit D (the copyrighted poster) was a proper subject for copyright; that is, whether it was in a proper sense the production of the plaintiff,—whether it was a novelty, whether it was a creation."*

Judge Lacombe followed this statement of the question by saying:

> *"It does not mean necessarily that the plaintiff must have been the sole intellectual genius that composed and devised it. He himself, working with men whom he employed to assist him for that purpose, if he succeeds in bringing out a work of original design, of merit, more or less artistic in its character, will be entitled to a copyright.*
>
> *"It is not the single individual only, or the artist alone, who is entitled to the copyright; it is the proprietor, the owner, as well as the artist."*

The whole of Judge Lacombe's charge to the jury in *Hegeman vs. Springer*, is printed as an appendix to this brief for the convenience of the court, copied from the original record in that case. (*Appendix B.*)

In *Bolles vs. Outing Co.*, 77 *Fed. Rep.* 966, 175 *U. S.* 262, Judge Wallace, for the Circuit Court of Appeals, said:

> *"Whether a photograph is a mere manual reproduction of subject matter, or an original work of art, is a question of fact."*

If we examine the pictures in question, starting with the *Statuary Act Design*, the conception of the landing of Columbus, which to our understanding is entirely novel, is certainly very artistic. The grouping of the Indians, their facial expressions, their kindly treatment of Columbus who stands as a young hero, are positively beautiful and elevating. So Apollo in his attitude towards the Muses is a fine conception; and it is entirely cruel to deny to the man who conceived and gave us these illustrations the right to prevent others copying them, simply because the original purpose was to use these pictures on posters for advertising purposes. As we examine the attitudes and costumes and the facial expressions in the *Stirk Family Design*, we find in them considerable beauty and more than ordinary originality of expression,—a skillful treatment of a hard and difficult subject. In the *Ballet picture*, the main effect intended to be produced is that of a large harmonious group; there is nothing offensive in the picture, nothing immoral in it, unless one chooses to hold that every ballet is immoral. The grouping is of a kind to indicate and teach harmony in a mass of individuals. The facial expressions are particularly well selected; so are the arrangement of dresses, their colors and their different characteristics, not only original but beautiful to the eye and taste of most people. We cannot seriously discuss the suggestion that it is an immoral picture, because it displays the legs and arms of the ballet girls; nor do we believe that an ordinary jury would have been shocked by that fact. It seems to be a case of "*Honi soit qui mal y pense.*"

Richardson vs. Miller, *Fed. Cases*, *No.* 11,791,

a case involving a design for playing cards, contains an interesting discussion of the question of alleged immoral or indecent tendencies, as limiting the privilege of copyright, and holds

that to deprive a picture or publication of the protection of the copyright law,—

> "It must appear either that there is something immoral, pernicious or indecent in the things *per se*, or that they are incapable of any use except in connection with some illegal and immoral act."

As a mere suggestion in this connection, suppose a new Hogarth should arise and seek to copyright a set of pictures like his famous "Rake's Progress": or suppose a new picture of "Phryne before her Judges", with all the suggestiveness which that great work embodies, were now to be copyrighted, would the courts hold that such works were barred from legal protection?

Copyrights of pictures are sustained under the constitutional power of Congress to "promote the progress of *useful arts*," by the ruling that pictorial art and the other fine arts, are also useful arts, because they are educational,—because they tend to elevate the tastes of the people and their appreciation of the beautiful. If a painting on canvas which can be seen by but a few in private galleries or museums, pertains to the useful arts for this reason, then surely a picture placed where every one can see it, a poster, or "cheap show-bill," if one chooses to call it so, if artistic in design is likewise useful, and in a greater degree. It disseminates ideas of taste and beauty among the masses; it reaches every nook and corner of the nation, and exercises its influence in places which the painter can never reach.

Some minor questions, discussed in the opinion of the Circuit Court, may be passed over briefly.

(1.) We have nothing to do with cases involving attempts to copyright *mere catalogues or price lists*, sometimes containing pictures, reproduced by photographic or other mechanical processes, of articles intended for sale, but which obviously have

no artistic merit or originality. These decisions, whether condemning or upholding such copyrights, do not touch the questions involved in the case at bar. Such is the case of

Mott Iron Works vs. Clow, 82 *Fed. Rep.* 216.

(2.) Nor are we concerned to discuss further the special statutory rule in regard to *copyrighting labels*, which was introduced by the Act of June 18, 1874, section 3. This statute, as pointed out in our note on page 19 above, introduced no new principle in regard to copyrighting labels, but simply required that they should be copyrighted in a particular manner, by registering them in the Patent Office, instead of entering them with the Librarian of Congress in the form and manner of other copyrights. There is nothing of the nature of a mere label about these pictures; and there is no peculiar principle of law governing the right to copyright a design for a label, which is something more than a *mere* label.

(3.) Nor need we discuss at length the significance of those phrases, "*Pictorial illustrations or works connected with the fine arts*," in the Act of June 18, 1874, which are dwelt upon to some extent by the Circuit Judge, and referred to in the opinion of the Circuit Court of Appeals.

This Act is entitled "An Act to amend the law relating to patents, trade-marks and copyrights." The first section prescribes the form of notice to be printed on copyrighted articles. The second section relates to the fees of the Librarian of Congress. The third section is in part as follows:

> "Sec. 3. That in the construction of this Act, the words 'engraving', 'cut' and 'print' shall be applied only to pictorial illustrations or works connected with the fine arts, and no prints or labels designed to be used for any other article of manufacture shall be entered under the copyright law, but may be registered in the Patent Office.

> And the Commissioner of Patents is hereby charged with the supervision and control of the entry or registry of such prints or labels," etc.

The first sentence of this section in some publications is printed as if it were a part of section 4952 of the Revised Statutes and is so printed and referred to in the opinion of the Circuit Judge, which is an error. The law of June 18, 1874, was passed shortly before the Revised Statutes were adopted, but took effect later, on August 1, 1874. It is an independent statute.

We might well argue that the pictures involved in this case, which are chromos, are not covered by the provisions of this statute; but it is unnecessary to do so. The statute certainly does not hurt the plaintiffs' claim for copyrights on these pictures in any way. Obviously they are "pictorial illustrations" in every sense of the words; and the suggestion of the circuit judge that these words might be confined to pictures "placed in a book or other publication to elucidate the text," will not bear a moment's reflection. That they are "pictorial illustrations" or representations, somewhat idealized, of scenes to be exhibited in the Wallace Circus, is the very point of the decision of the Circuit Court of Appeals.

Equally plain is it that they are "works connected with the fine arts." They are works connected with the arts of drawing and engraving, which are fine arts. The statute does not say that they must be works embodying the highest conceptions or the best results of the fine arts, or that they must be good specimens of their particular art. It does not furnish any standard for judging these things. It simply refers to "works connected with the fine arts," and however poor specimens they might be they would come within this phrase.

The truth is that this statute does not furnish any basis or test whatever for deciding whether a picture is copyrightable, and was not intended to do so. It was intended to classify

and distinguish ordinary "prints or labels, designed to be used for any other article of manufacture," on the one hand, from other "pictorial illustrations or works connected with the fine arts" on the other hand, for the purpose of providing that one class of articles shall be copyrighted in one manner and the other class in another manner; both of them being copyrightable, so far as this law was concerned.

This statute, therefore, throws no light whatever on the questions involved in this case, and, as we respectfully submit, has only served to introduce confusion into the decisions of the lower courts.

(4.) Nor need we pay further attention to the question upon which the defense relied and apparently rested their case in making the motion for a nonsuit, whether these pictures were barred from copyright because, as the defense claimed, they were "*mere matter of advertising,*" the fact being that they were primarily designed to be sold to proprietors of circuses and shows for advertising their productions.

As we have pointed out, this contention was not adopted by the Circuit Judge, and the Circuit Court of Appeals expressly declined to adopt it. (See opinion, page 76, quoted above, page 19.)

The Circuit Court of Appeals cited as sufficient authority for declining to rule against these copyrights upon this ground the case of

Yuengling vs. Schile, 12 *Fed. Rep.* 97, 101,

which held that a chromo entitled "Gambrinus and his Followers," intended as a glorification of lager beer drinking, and designed and circulated as an advertisement of a brewer, was a proper subject of copyright, because it was "a work of the imagination, and has such obvious artistic qualities as render it fairly a subject of copyright, without regard to the use which the plaintiff has made or may intend to make of it.

"To the same effect (continued the court) is the case of *Schumaker vs. Schwencke*, 25 *Fed. Rep.* 466, and *Lamb vs. Grand Rapids School Furniture Co.*, 39 *Fed. Rep.* 474."

In *Drone on Copyright*, pages 164, 165, speaking of the copyright of a picture or publication designed for advertising purposes, the author says:

> "The question depends not on the intention of the author or the use made of the protection, but on its inherent qualities. Publications used for advertising must be governed by the same principles that apply to other works. When they lack the inherent qualities essential to copyright, they are not entitled to protection; when they have such qualities they are within the scope of the law."

See also, to same effect:

Grace vs. Newman, *Law Rep.* 19 *Eq. Cases*, 623.
Maple vs. Junior Army & Navy Stores, *Law Rep.* 21 *Ch. Div.* 369.
Church vs. Linton, 25 *Ont. Rep.* 131.

We come back to our *main proposition*, that these pictures are of sufficient artistic merit and of sufficient value and usefulness to be entitled to copyright, and that there was at least enough evidence of this to be submitted to the jury, so that it was improper to nonsuit.

As to the *degree of artistic merit and value required* for this purpose, the cases cited under the first subdivision of this point, relating to originality of design, are also authorities here. They show, as stated by the court in *Carlisle vs. Colusa County*, 57 *Fed. Rep.* 979, that:

> "*The degree of merit of the copyrighted matter the law is not concerned with. Any is legally enough. To use it or not use it, is voluntary on the part of the public.*"

In *Drone on Copyright, pp.* 211, 212, cited with approval in *Henderson vs. Tompkins*, 60 *Fed. Rep.* 758, 765, the author says:

> *"To be worthy a copyright, a thing must have some value as a composition, sufficiently material to lift it above utter insignificance and worthlessness. * * * If it has merit and value enough to be the object of piracy, it should also be of sufficient importance to be entitled to protection."*

The case of *Henderson vs. Tompkins*, 60 *Fed. Rep.* 758, decided by Judge Putnam in the Circuit Court, in Massachusetts, in 1894, is of such interest that we quote at large from the opinion.

The question of frivolity of a copyrighted song had been raised and was carefully discussed. The song was in these words:

"Hi, diddle, diddle,
The cat and fiddle,
A parrot and monkey too;
Bells they are ringing,
There's fighting and singing;
I wonder if dreams come true."

The court sustained this copyright against demurrer, and, in addition to the quotations above made from *Drone on Copyright*, said as follows:

> "It is enough to say that whether we look only at the direct results of what is addressed to the taste, the imagination, or the capacity of being amused, and the enjoyment which immediately follows therefrom, or whether we look further, and consider what is essential to keep the physical, moral, and intellectual powers refreshed, all such have been regarded by the courts, ever since patents or copyrights were authorized by statute, as within the range of utility and the useful arts. Even when the intellect is strained to accomplish its greatest results, the standard prescription from Euclid may be useful, but an occasional one from the Book of Nonsense is not to be despised.

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"The learned author of *Walker on Patents* has well said:

"'*Utility is not negatived by the fact that the manufacture covered by the patent has no function except to decorate the object to which it is designed to be attached. In such cases, utility resides in beauty. Whatever is beautiful is useful, because beauty gives pleasure, and pleasure is a kind of happiness, and happiness is the ultimate object of the use of all things.*'

* * * * * *

"If judicial tribunals could lay down maxims by which to determine judicially what dramatic compositions claimed to be humorous, or to appeal to the sense of humor, are in this particular within or without the copyright act, they would, by demonstration, be in possession of rules which would enable them to be themselves at all times witty, at their own option. The very essence of some kinds of humor is in unexpectedness and lack of proportion; and, therefore, neither courts nor juries have any certain rule for valuing it, except such as comes from evidence of the effect which the composition in question has on masses of men. The claim made by the defendant that the '*box-office value*' fails to furnish any test under the copyright laws of the United States, with reference to dramatic compositions, is not sustainable.

* * * * * *

"But a multitude of books rest safely under copyright which show only ordinary skill and diligence in their preparation. Compilations are noticeable examples of this fact. With reference to this subject, *the courts have not undertaken to assume the functions of critics, or to measure carefully the degree of originality, or literary skill or training involved.* An example of the moderate degree of literary merit sufficient to entitle a dramatic composition to protection under the statutes, is found in *Daly vs. Palmer*, 6 *Blatchf.* 256 (Fed. Cas. No. 3552) and again in *Daly vs. Webster* (decided by the Court of Appeals for the Second Circuit), 4 C. C. A. 10, 56 Fed. 483, each touching the 'railroad scene' so called. There is also the case, not officially reported, of the comic song, entitled, 'Slap, Bang,

Here We Are Again!' protected by the common pleas division, although the impression which the title gives would suggest little value, except what might be shown by sales. It appeared in this case that the copyright was worth from one thousand pounds to two thousand pounds, and at the time of the trial as many as 90,000 copies had been sold. * * *

"Under the copyright side of the statute, however, especially so far as it relates to dramatic compositions, what appeals to the sense of curiosity, or excites wonder, is especially valuable, and therefore must be protected, or the purpose of the statute would fail in a very large measure."

These authorities seem to demonstrate that the courts will not turn themselves into art critics in passing upon questions of copyright, and that these pictures possess sufficient merit, as well as originality, to be entitled to the protection of the law.

In conclusion, we repeat that to deny to artists designing pictures of this class, or to the proprietors of such pictures, the privilege of copyright, would lead surely to the result that artists would no longer be employed to produce them. Publishers cannot produce artistic designs without the assistance of highly paid artists, and they certainly would not employ highly paid artists for creations which when published would be free to any one to copy. Hence the natural development of a line of productive art, which under the protection of the copyright law has made desirable advances and has become a great institution, the art of modern lithography, would be arrested, and its course would be turned backward.

Besides other distinguished artists mentioned in the appendix to this brief as having produced artistic posters, it is well known that the celebrated painter, Sir John Millais, received a large sum, $10,000, for the picture "The Boy and the Soap Bubble,"

which he made to order, as a poster and window advertisement for Pear's soap. Such talent will no longer serve the public in this way, if the view of the courts below is sustained.

When Congress allowed the protection of copyright to artisticly designed labels on cigar boxes and the like, it certainly had no intention of saying that designs for posters should be without copyright protection. Congress does not look to the purpose any further than its laws state. In speaking of "pictorial illustrations or works connected with the fine arts," it meant that these should illustrate the artist's conception of the thing or idea he was seeking to depict. The pleasure of the circus, that institution so dear to the heart of the young American and to many of maturer years, like the pleasure of the theater, is undoubtedly heightened by anticipation created through posters and showbills like those in suit. They do not degrade, but tend to give pleasure,—to cultivate and improve the popular taste and love of the beautiful. Hence they obviously serve a useful purpose, or are intended to do so.

If they succeed in this purpose of pleasing and attracting the public, in however modest a degree, and if they are of such a character as to admit of intellectual and artistic treatment, they are entitled to the protection of copyright.

If there was any doubt about these qualities in the pictures, now before the court, this became a question of fact, which should have been submitted to the jury.

POINT II.

THE DESIGNS WERE PROPERLY COPYRIGHTED.

(A.)

The copyrights were properly taken out by the plaintiffs in their trade names of "*The Courier Co.*" and "*The Courier Litho. Co.*", and the plaintiffs have the right to sue in their individual names for infringement of these copyrights.

A question about this was suggested by the Trial Judge in his remark, made early in the case (Record, page 28):

> "The real controversy will be whether this is a subject of copyright, whether it comes within the copyright law —*it might be whether the proper person has applied for obtaining the copyright.*"

But no such question was raised by defendant's counsel in the motion for peremptory instructions.

The Trial Judge, in his opinion, considered this subject, and stated (page 65):

> "The court, indeed, might have grave doubts whether the Courier Litho. Co., which is a mere trade name of a certain department of the business of the unincorporated association known under the laws of New York as the Courier Company, is or can be the author, inventor, designer or proprietor of any of the things copyrighted within the meaning of Section 4952."

The Trial Judge then proceeded to discuss, to the extent of a page, the question whether any title was shown in the Courier Lithographing Co. as to any of the prints, though he seemed to concede "that *a title would result from the fact that a designer in the employ of the Courier Company designed one, or possibly two, of the pictures;*" and he made a very confused statement of the facts.

The facts are clearly and conclusively shown by the testimony of Mr. Bleistein (quoted on pages 14 and 15, *supra*), that all of the pictures were designed by an artist, Mr. Bandlow, who was in the employ of the Courier Company, and belonged to the Courier Company as proprietor, by the express terms of their contract with this artist,—"What he does produce belongs to us, because we pay for it to him." (Record, page 34, and see also pages 35, 36, 37 and 38.)

But, in conclusion, the Trial Judge said: "The court does not feel called upon to pass definitely upon this question;" and he proceeded to grant the nonsuit upon another and distinct ground, as we have pointed out.

The Circuit Court of Appeals, in its statement of the facts and opinion thereon, paid no attention to these doubts which the Trial Judge had expressed. It stated the facts in the main correctly, and plainly assumed that the pictures were properly copyrighted, as to the time, form and manner of the several copyrights, and that the plaintiffs, as individuals, had the right to sue for infringement of the copyrights; but it held that the pictures lacked the degree of artistic merit and creativeness which, according to its view, the law requires to sustain a copyright.

We quote the facts from the statement made by the Circuit Court of Appeals (page 73), as follows:

> "The plaintiffs sue as members of a joint stock association under the law of New York, known as 'The Courier Company,' but doing a part of their business under the name of the 'Courier Lithographing Company.' Two of the copyrights in question were copyrighted in the name of the 'Courier Company' and one in the name of the 'Courier Lithographing Company,' that known under the title of the 'Statuary Design'."

There is a slight and unimportant error in this statement. The first two pictures, the Ballet and Stirk Family designs,

were copyrighted in the name of "The Courier Litho. Co.": the last one, the Statuary Act, was copyrighted in the name of "The Courier Co." The court continued:

> "The titles of the first two named were deposited with the Librarian of Congress, April 11, 1898. The last was deposited April 18, 1898, though it was in evidence that the *application and title was deposited in the mail, addressed to Librarian of Congress, on April* 15, 1898.
>
> "A large number of prints of each of said designs were shipped April 11, 1898, by the plaintiff company from Buffalo, N. Y., to the agent of the Wallace circus at Peru, Ind., for circulation and distribution. The time of arrival at Peru is not shown."

But it was shown that they were "*due to arrive*" *at Peru, Ind., on April* 15*th*,—"*in order to be in time to go out on their* (*Wallace's*) *advertising car.*" (Record, page 54, and see also pages 39, 40, 48, 50, 53.) This was the very day when the last copyright was surely completed, by depositing the title of the Statuary Act Design in the mail.

From these facts it does not seem that there is anything in the questions suggested by the Trial Court to throw doubt upon the proposition stated at the head of this point, or to require extended discussion.

The Courier Company is an unincorporated joint stock association under the New York statute, known, in its present form, as the *Joint Stock Association Law*, chapter 235 of the laws of 1894.

This law is quoted, in its important provisions, as *Appendix C*, at the end of this brief.

The Courier Lithographing Company is not an independent or distinct organization, but is a mere name under which the Courier Company did a part of its business,—the lithographing branch of the Courier Company. In other words, the Courier Company is a general printing and publishing concern, having

various branches to its business, one of which, the lithographing branch, was for convenience sometimes designated as the Courier Lithographing Co.

The plaintiffs are the members of the unincorporated joint stock association properly known as the Courier Company, but also sometimes known, in one of the branches of its work, as the Courier Lithographing Co. They are properly described in the title of the action as "doing business under the name (or names) of The Courier Co. and The Courier Lithographing Co."; and in the declaration it is properly alleged that they "compose the unincorporated association known as the 'Courier Company' and also known as the 'Courier Lithographing Company'". (Page 3.)

Under the New York statute, the plaintiffs are practically copartners in business. Such associations differ from ordinary copartnerships only in the relation of the members to each other, and principally in the fact that they are not dissolved by the death of a member, if the articles of agreement so provide. As to third parties, the members are copartners, jointly liable for the acts and debts of the concern. These associations are required to file an annual certificate (Joint Stock Association Law, sec. 4); and the proofs are that such certificates were filed by the Courier Company. (Record, page 29.)

Obviously, this action was properly brought by the plaintiffs in their individual names. In fact it could not be brought otherwise, as there is no statute of the United States or of the State of Kentucky, so far as known, which would permit it; and upon ordinary principles the plaintiffs, not being a corporation, could only sue as individuals. There is a statute in New York (Code of Civil Procedure, section 1919, printed at the end of Appendix A, in this brief), which *permits* such an unincorporated association to sue and be sued in the name of its president or treasurer, when it consists of seven or more

persons; but this statute is merely permissive, not mandatory, and it has of course no extra-territorial force.

> "Joint stock companies and unincorporated associations, unless otherwise provided by statute, are treated as, and have all the attributes of, a common partnership, there being no intermediate step between a partnership and a corporation known to the common law."
>
> *Am. & Eng. En. of Law, First Ed., Vol. XVII, p.* 863; *Second Ed., Vol. XVII, pp.* 636, 637, *et seq.*
>
> *Whitehead vs. Allen*, 4 *Abb. Ct. of App. Dec. (N. Y.)* 628.

> "A joint stock company is a partnership with some of the powers of a corporation."
>
> *People ex rel. Winchester vs. Coleman*, 133 *N. Y.* 279, 283, 286.
>
> *Citing Van Aernam vs. Bleistein*, 102 *N. Y.* 360.

Equally plain is it that the plaintiffs as copartners have the right to do business under the name of the "Courier Company" or the "Courier Lithographing Company," or both of these names, and have the right to take out patents and copyrights in these names.

> "A firm may have several names * * * in which case all of the members are equally liable on its contracts * * * under whatever name they may have been made."
>
> *Am. & Eng. En. of Law, First Ed., Vol. XVII, p.* 915; *Second Ed., Vol. XXII, pp.* 79, 80.
>
> *Wright vs. Hooker*, 10 *N. Y.* 51.
>
> *Hunt vs. Semonin*, 79 *Ky.* 270.
>
> *In re Williams, Fed. Cases, No.* 17,707.

The U. S. Revised Statutes, in the first section, provide that "the word '*person*' may extend and be applied to partnerships and corporations."

That copartners in business, who are the proprietors of a copyrighted article, may take out a copyright in either of their copartnership or trade names, is well settled.

Scribner vs. Clark, 50 *Fed. Rep.* 473; *affirmed as*
Belford, Clark & Co., vs. Scribner, 144 *U. S.* 488.
Callaghan vs. Myers, 128 *U. S.* 617.
Scribner vs. Allen Co., 49 *Fed. Rep.* 854.
Werckmeistsr vs. Springer Lith. Co., 63 *Fed. Rep.* 808
Rock vs. Lazarus, Law Rep., 15 *Eq. Cases*, 104.
Weldon vs. Dicks, Law Rep., 10 *Ch. Div.* 247.

The same principle was applied to a patent in *Fruit-Cleaning Co. vs. Fresno Home Packing Co.*, 94 *Fed. Rep.* 845.

Finally, the plaintiffs were the "*proprietor*" of each of the copyrighted prints, and as such were authorized to take out the copyrights by the express language of the copyright law, R. S., sec. 4952, which includes "proprietors" with "authors, inventors (and) designers."

That they were the owners or proprietors of the prints, was shown by Mr. Bleistein's testimony (quoted above, pages 14 and 15; and see pages 34, 35, 36, 37 and 38 of the record); and especially by his clear statement, on page 36:

> "My agreement with Mr. Bandlow is that he was to receive while in our employ $100 a week as designer. He was to furnish us with such designs as we needed, and they were to be our property; for consideration of that he was to receive $100 per week."

Mr. Bleistein testified that Bandlow made all these designs for the plaintiffs under this contract.

> "The literary product of a salaried employee, the result of compilations made in the course of his employment, becomes the property of the employer, who may copyright it."

Colliery Eng. Co. vs. United, etc. Co., 94 *Fed. Rep.* 152.

No formal assignment of the right to a copyright is necessary. *Consent* is sufficient to constitute one the proprietor.

Carte vs. Evans, 27 *Fed. Rep.* 861.
See also, Schumacher vs. Schwencke, 25 *Fed. Rep.* 466.
Little vs. Gould, Fed. Cases, No. 8,395.

And see the luminous opinion of Mr. Justice Clifford in *Lawrence vs. Dana, Fed. Cases, No.* 8,136.

Also *Sweet vs. Benning*, 81 *Eng. Com. Law Rep.* 459; 16 *Com. Bench Rep.* 459; and many other English cases.

The case at bar in this respect is in complete analogy with the doctrine of this court regarding the ownership of patents for inventions, where a man is employed for the purpose of making inventions,—the court holding that any patent taken on them belongs to his employer.

Thus in *Gill vs. United States*, 160 *U. S.*, 426, at page 435, the court said:

> "On the other hand, it is equally clear that if the patentee be employed to invent or devise such improvements, his patents obtained therefor belong to his employer, since in making such improvements he is merely doing what he was hired to do."

These authorities, applied to the proved and undisputed facts, abundantly establish the proposition (A) stated at the head of this point.

(B.)

All of the pictures, and particularly the Statuary Act Design, were copyrighted before publicaton.

No question was raised as to the date of copyright of the Ballet or Stirk Family Design. But defendant's counsel, in his motion for peremptory instructions, claimed that the

Statuary Act was not copyrighted until April 18, 1898, while he said that the publication was before that. His statement is quite erroneous.

The Trial Judge in his opinion got into some confusion on this subject, but did not decide the question. The Court of Appeals paid no attention to it, after stating the facts.

The facts in this connection are stated above (pages 42, 43), under subdivision (A) of this point.

The printed title of this particular design, the Statuary Act, with an application for its copyright, was deposited in the mail addressed to the Librarian of Congress on April 15, 1898. (Record, pages 57, 58; also pages 40, 42, 44.) It was received by the Librarian on April 18, and his certificate of copyright shows the deposit of the title or description on that date. (Record, page 6, pages 27, 28, etc.)

But it also appears that two copies of the print itself were filed in the Librarian's office on April 11. The Librarian himself certifies to the deposit on that date. (Record, end of page 27.) The official catalogue issued by him on April 20, 1898, which was offered in evidence but not received (pages 28, 29), sets forth the copyright of this print as follows:

> "Also 'Statuary Act Design' (1898, No. 24,345, Apr. 18, 2 copies rec'd Apr. 11, 1898)."

This publication, as we submit, was erroneously excluded by the Trial Court; but whether or not it was properly excluded, the fact remains of record that the plaintiffs sent two copies of the prints to the Librarian so that they were received by him on April 11; and that afterwards they sent the printed title or description, with a further application for copyright, on April 15, which was received on April 18.

Under these circumstances we claim that this copyright should *prima facie* be dated at least as early as April 11, when

the two copies of the picture were received by the Librarian. If these copies contained the printed title, then the copyright was complete on April 11; if they did not contain the title, then it might require to be completed by subsequent special deposit of the title. But that was a question of fact which should have been submitted to the jury, and could not be, and was not really, taken as a ground for directing a finding for the defendant. The subsequent filing of the same title would not in any manner affect the validity of the copyright if already duly secured, and the act of the Librarian, in dating it from April 18, when he subsequently received the separate title, cannot be conclusive against the plaintiffs.

Indeed, the copyright does not date from the receipt by the Librarian of either the title of the copyrighted publication, or the two copies. It dates from the day when the plaintiffs *deposited in the mail*, addressed to the Librarian, "*a printed copy of the title of the book* * * * *engraving, cut, print, photograph or chromo*", and *deposited in the mail*, likewise addressed, "*two copies of such copyright book*, * * * *engraving, chromo, cut, print,*" etc. (R. S. Section 4956).

The exclusive right is secured by depositing the articles to be copyrighted, and their title, in the mail. Even though they should be delayed unreasonably in the mail, or should never be received by the Librarian, on and after the day of such deposit, the proprietor has the right to publish and be protected by law.

In this instance the two copies of the prints were sent to the Librarian of Congress some time before April 11, and were received by him on that date; and the separate printed title was mailed to him on April 15. If we are wrong in our suggestion that the protection of this copyright dates from as early as April 11, then it certainly dates from April 15.

There was no publication of this print before April 15; in-

deed, there was no evidence that it was published on that day, or for some time after it.

The statute (section 4956) requires the deposit in the mail to be made "*on or before the day of publication,*" and again "not later than the day of the publication." The publication can safely be made on the day of the mailing.

The evidence already referred to shows that all of these prints, including the Statuary Act, were shipped from Buffalo on April 11, addressed to the agent of the Wallace circus at Peru, Indiana, and "*due to arrive*" there on April 15, "in order to be in time to go out on their (Wallace's) advertising car." (Record, page 54; also pages 39, 40, 48, 50, 53.)

In other words, the prints when they arrived at Peru, Indiana, were not to be opened or distributed to the public; but from there were to be shipped on the advertising car to other points, where they would subsequently be opened and published, in the ordinary course of events.

This surely did not amount to proof of publication of any of these prints before April 15, or even on April 15,—though the publication on April 15 would be consistent with the copyright. It only shows that by April 15 they were to reach one stage in their journey towards their ultimate destination, where they would finally be published.

The law is well settled that there was no publication of these prints when they were shipped from Buffalo on April 11, *or when they were received by Mr. Wallace at Peru, Indiana, on or about April* 15. *There was no publication until they were exposed to the general public, so that the public, without discrimination as to persons, might enjoy them. This must have been some time after April* 15, *when the last copyright was surely completed.*

Publication is a legal conclusion which follows from certain acts.

> "And for a definition of publication, we find it stated in *Drone on Copyright, p.* 291: 'A book is published when

printed copies are sold unconditionally to the public. * * * To constitute a publication it is essential that the work shall be exposed for sale or gratuitously offered to the general public, so that the public, without discrimination as to persons, may enjoy that for which protection is granted. Printing itself cannot amount to a publication, for the obvious reason that a book may be withheld from the public long after it has been printed.'"

Jewelers Merc. Agency vs. Jewelers Pub. Co., 84 *Hun* (*N. Y. Sup. Ct.*) 12, 16.

In *Callaghan vs. Myers*, 128 *U. S.* 617, the court held as to volume 34 of the Illinois Reports, the copyright in which had been completed on the day of publication, that the presumption was that the copyright was completed prior to the publication, using these words:

"In the absence of evidence to the contrary, which it was open to the defendants to introduce, *it must be presumed that the deposit of the title was made in each case before publication.* * * * *It must be presumed*, in the absence of evidence to the contrary, *that the deposit of the title preceded the publication* and that the delivery of the copies to the Secretary of State preceded the deposit of the work in the clerk's office. Where the three things are prescribed by the statute to be done in consecutive order, and all three appear to have been on the same day, it will be presumed that the statute was complied with, leaving the *prima facie* evidence open to be rebutted."

Where a publisher announced in advance the date on which a book would be published, and three days prior thereto shipped copies of the work to dealers, together with instructions that the same were not to be sold or in any way offered to the public until the given day; in the absence of proof to the contrary, *it is to be presumed that publication did not take place prior to the date fixed.*

Black vs. Henry G. Allen Co., 56 *Fed. Rep.* 764.

In *Belford, Clarke & Co. vs. Scribner*, 144 *U. S.* 488, and in *Garland vs. Gemmill*, 14 *Canada Sup. Ct. Rep.* 321, it was held that the deposit of copies in the office of the Librarian of Congress, or the Minister of Agriculture, before copyright had been secured, did not constitute a publication; the court saying that the argument to the contrary was "ingenious, but fallacious."

In *Prince Albert vs. Strange*, 2 *De Gex & Smale*, 652; 1 *Macnaghten & Gordon*, 47 *Eng. Ch. Rep.* 25, it was held that where a printer had been employed to take a few impressions, and some of them had been distributed to the personal friends of the author, the rest being kept in private apartments, this did not constitute a publication.

The representation of a play upon the stage regularly at a theater, does not constitute a publication.

Thompkins vs. Halleck, 133 *Mass.* 32.
Palmer vs. De Witt, 47 *N. Y.* 532.
Boucicault vs. Hart, Fed. Cases, No. 1692.

The use by a teacher of his manuscript and allowing pupils to make copies for the purpose of obtaining his instruction, does not amount to a publication.

Bartlett vs. Crittenden, Fed. Cases, Nos. 1076 *and* 1082.

The printing of copies of an operetta and distributing them to artists, for private use only in learning their parts, and the representing of the operetta on the stage, is not a publication.

French vs. Kreling, 63 *Fed. Rep.* 621.

See also:

Reed vs. Carusi, Fed. Cases, No. 11642.
Blume vs. Spear, 30 *Fed. Rep.* 629.
Exch. Tel. Co. vs. Cent. News, Law Rep. 2 *Ch. Div.* 48.

POINT III.

The Trial Court erred in the rejection of certain evidence offered by the plaintiffs and specified in the Assignment of Errors.

(Record, pages 79 and 80.)

The Assignment of Errors points out clearly the nature of the evidence which was excluded, with references to the record. We respectfully urge that each of these exceptions to the exclusion of evidence was well taken, and should be considered by this court as sufficient ground for reversal.

But in view of the more vital questions involved in the case, we shall not occupy the time of the court with any elaboration of these questions of evidence. The errors involved are too plain to require argument.

POINT IV.

In view of the fact that the Circuit Court took this case from the jury and directed a nonsuit, the real question, and perhaps the only question for discussion on this appeal, is whether on their face the copyrighted pictures are proper subjects of copyright.

If this was in doubt, it was a question for the jury, and to the jury it should have been sent.

We respectfully submit that the judgments of the Circuit Court and the Circuit Court of Appeals should be reversed, and the case remitted to the Circuit Court for the District of Kentucky, for a new trial, with proper instructions upon all the foregoing points.

October Term, 1902.

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APPENDIX.

APPENDIX A, referred to in page 10.

Added to Brief for Plaintiffs in Error,
in Bleistein and others vs. Donaldson Lithograph Co.

Quotations from book entitled "*Picture Posters,*"
by Charles Hiatt, published by George Bell & Sons, London, 1895.

"CHAPTER I.—*The Story of the Pictorial Poster.*

"It would be merely foolish to pretend that the pictorial poster, looked at from the point of view of art, is of the same importance as a portrait by Velasquez or an etching by Rembrandt. Its æsthetic qualities have of necessity to be subordinated to its commercial qualities; the artist is the servant of the tradesman. His first business is not to achieve a decoration, but to call the attention of the man in the street to the merits of an article. He may be fantastic only in so far as his fantasy assists the advertisement; he must ever keep before his eyes the narrow object of his effort. The closest limits are set to his invention; it is not for him to do what he will, but rather to do what he must. Under such circumstances, it is, at the first blush, somewhat surprising that artists have condescended to the poster at all. The bounds of freedom in the cases of painting and of sculpture are, comparatively speaking, so wide that one is not unnaturally amazed that the artist of talent is willing to work within the strict limitations imposed on him in the production of a pictorial poster.

"And yet, after all, to the ingenious designer there is a certain fascination in the very strictness of these limits; the complexity of the problem allures him, and gives him the appetite for experiment. Moreover, if he believe that art is something more than a vague grace, a non-essential luxury, he is ever anxious to extend her domain, to make

her empire universal. He believes it to be his mission to touch some ugly necessity, to inform it with art, and, in doing so, to adorn it. He is restless for new worlds to conquer, for fresh fields to occupy. His ideal is art everywhere, art in all. He would fain give style and grace even to the paraphernalia of commerce; the necessities of trade shall not be hideous if he can make them otherwise. And so it happens that he is willing, nay, eager, to turn his attention to the poster, with the result that the boarding becomes an interesting, even a charming, gallery of designs. What was one of the most hideous of human inventions is transformed into a delight to the eyes. Color and interest are added to the street; the gay and joyous take the place of the dull and ugly.

"It follows, supposing that I have stated the case fairly, that it is not derogatory to the dignity, even of a very great artist, to apply his talent to the poster.

"It is clear that the poster is one of the oldest and most obvious forms of advertisement. It is almost impossible to conceive a time in the history of man, once he had learned to express his thoughts in design or in writing, when the idea of the thing did not exist. It must have been an incident of the most crude and ancient of civilizations; even the cave-dweller in the dim and distant past must surely have possessed the essential idea of it. From the cave-dweller to the comparatively complex civilization of the ancient and greater Egypt is a far cry. That the mural inscription, which is obviously the germ of the poster, flourished exceedingly in the land of the Pharaohs is matter of history. A papyrus is comprised in the collections of the Louvre, which may fairly be described as a poster. It is dated so early as 146 B. C., and deals at length with the escape of two slaves from the city of Alexandria, offering a reward to anybody who should discover their place of retreat. Still more interesting, though less ancient, is an inscription in Greek, discovered in the Temple at Jerusalem, in 1872, by M. Clermont-Gannerau. It was issued during the reign of Herod the Great, and forbids the entry, by foreigners, to certain parts of the Temple on pain of death."

* * * * * * *

"CHAPTER II.—*The Pictorial Poster in France during the Present Century.*

"As we have seen, the idea of the poster, and even of the pictorial poster, is an extremely ancient one, but it is only at the commencement of the present century that distinguished designers deliberately attempted to make the pictorial poster a work of art. The few posters, at once pictorial and artistic, which are of earlier date than the time in question, are artistic by accident rather than by deliberate intention. So early, however, as the year 1836, we find a really distinguished French artist, Lalance, producing a poster."

A design for a poster somewhat similar to the "Stirk Family Design" will be found on page 83 of Mr. Hiatt's book. A ballet poster embodying the same idea with our "Spectacular Ballet Design", but quite differently worked out, will be found on page 35 of that book. These are selected by the author as specimens of good posters.

Among the names of well-known artists mentioned in this work as having produced posters for use as artistic advertisements, we select a few as follows:

French: Cheret, Grasset, Toulouse-Lautrec, Willette, and many others.

English: Fred Walker, Walter Crane, Prof. Herkomer, H. Stacy Marks, E. J. Poynter, Sir James Linton, Aubrey Beardsley, Charles Ffoulkes, Sir John Millais.

American: Edward Penfield, Louis J. Rhead, W. H. Bradley, Francis Day, H. McCarter, Kenyon Cox, Edwin A. Abbey.

In the book published by Scribners, entitled "The Modern Poster", are many reproductions of show-bills of undoubted artistic merit. Thus, on page 80, the theatrical poster for

"Rip Van Winkle", on page 81 that for "Uncle Tom's Cabin", on page 83 that for "Jefferson in 'Fighting Bob'", on page 88 the poster advertising the play known as "Hoyt's 'A Milk White Flag'", the circus poster on page 90, and many others, show the high development of pictorial art represented in the modern poster in this and other countries which has been encouraged by the copyright law.

Sir John Millais' poster, "The Boy and the Soap Bubble", advertising Pear's soap, is copied on page 42 of the Scribner book.

APPENDIX B, referred to in pages 29, 30.

Added to Brief for Plaintiffs in Error,

in Bleistein and others vs. Donaldson Lithograph Co.

"BLACK CROOK" CASES.

In our brief, pages 29 and 30, arguing that there was at least a question of fact for the jury upon the artistic merit and value of the plaintiffs' three designs, we quoted from *Hegeman vs. Springer*, tried before Judge Lacombe in 1899, and affirmed by the Circuit Court of Appeals, Second Circuit, in 110 *Fed. Rep. page* 374.

This case involved the copyright of a show-bill illustrating a scene from the "Black Crook", a spectacular theatrical show, in many respects like our Ballet design. *Judge Lacombe submitted to the jury the question of fact whether this poster was a proper subject of copyright.*

His entire charge to the jury is printed below.

We did not think it worth while, in the body of the brief, to distinguish the case of *Martinetti vs. Maguire, Fed. Cases, No.* 9173, which was much relied on by our opponents in the Circuit Court of Appeals; but which neither of the courts below cited

in its opinion. That was also a "Black Crook" case, decided in 1867, by Judge Deady, in California. All such spectacles as the "Black Crook" were then new to the American public, and to the judicial mind. Judge Deady discussed the moral tendencies of this show,—whether it was "suited to public representation", and seemed inclined to condemn it in moderate terms.

But the actual holding in that case was that the "Black Crook" was not, within the meaning of the copyright law, a "*dramatic composition*,"—it was not a drama, but a mere spectacle; and that it was not copyrightable as a "dramatic composition."

This was not a copyright of a picture or design, but of an alleged "dramatic composition." It, therefore, had little or no resemblance to the copyrights of designs involved in the case at bar. But the copyrighted "Black Crook" *picture*, which was sustained in *Hegeman vs. Springer*, was in all essential respects like our designs.

COPY OF JUDGE LACOMBE'S CHARGE in *Hegeman vs. Springer*.

> "The Court: Gentlemen of the jury, this is an action under the federal statutes, to recover certain sheets, which, if the plaintiff is right in his contention, have been forfeited to him; and also to recover a penalty of one dollar for each and every print or impression found in the possession of the defendant. Usually in these actions the one question that the jury has to deal with is whether the print which is found in the possession of the defendant is or is not an infringement of the plaintiff's copyright. That question is entirely eliminated from this case. Exhibit D, which is the lower of the two pictures before you, is an exact duplication not only of the prints which were found in the defendant's shop, but also of the print which the plaintiff copyrighted. Apparently the impressions which were inclosed in the envelope and sent to Washington, and the impressions which were found in the defendant's warehouse, of which the lower picture is one, were all printed from the same stone. That question is out of this case.

"I further charge you that from the testimony here it appears that the plaintiff took the requisite steps which the statute requires him to take in order to secure a copyright for a particular lithographic design, print or composition, which he sent down to Washington, to wit, Exhibit D, the lower of those two.

"In fact, the only real question in the case for you to pass upon is whether Exhibit D was a proper subject of copyright; that is, whether it was in a proper sense the production of the plaintiff, whether it was a novelty, whether it was a creation.

"It does not mean necessarily that the plaintiff must have been the sole intellectual genius that composed and devised it. He himself working with men whom he employed to assist him for that purpose, if he succeeds in bringing out a work of original design, of merit, more or less artistic in its character, will be entitled to a copyright.

"It is not the single individual only, or the artist alone, who is entitled to the copyright; it is the proprietor, the owner, as well as the artist.

"The story of the plaintiff is, and it is not contradicted, that, desiring a lithograph of this sort as a species of advertisement for shop windows, side walls and where all, of the 'Black Crook' Company, he instructed his artist to prepare a sketch, and revised the sketch himself—a sketch intended to represent the ballet of that piece; that he gave to the artist a photograph of Stalacta, the woman who represents the part of the Queen of the Fairies—an actual photograph of a woman who was then appearing in one of the companies, and in the costume in which she was then appearing, and told him to put that on one side of the picture, and to put Mephistopheles on the other side, and between the two to put in what the witness described as 'two premieres and a large ballet'; to get up the design, and the artist did so. That is what you see before you, Exhibit D. There is evidence here before you, abundant evidence, that prior to that time Exhibit 1 was in existence and was well known by the plaintiff; and indeed you will perceive that Exhibit 1 has the figure of Stalacta on the side, also taken from the same photograph, the figures being identical.

"It is apparent, without any discussion or pointing out, that aside from the representation of Stalacta there are a great many differences between those two compositions.

It is a question which will be for you to determine, whether or not, having before him a photograph of the Stalacta, having before him this Exhibit 1 of which he knew before—you may even take into consideration that he had before him Exhibit 2—an artist may be said to have produced an original composition when he produced Exhibit D. Of course in disposing of that question you are to take all the circumstances into consideration. Necessarily an artist is somewhat circumscribed as to what he is to produce, when he is instructed to compose something which shall indicate the presence of a ballet upon the stage; of course under those circumstances he does not paint sheep in a meadow or a man fishing off a bridge; and when you come to variations in display of the ballet, there are of course variations of the faces of the women, of their forms also to a greater or less extent possibly, and of their postures and their drapery, and of the background; and that is about all.

"Looking at those pictures before you, you are to say, looking at it from a sensible and reasonable point of view, whether the artist who was given the problem has really composed something new, artistically, in the lower of those productions there, Exhibit D. If he has, the mere circumstance that the one figure in it, that of Stalacta, is borrowed, and that he is not entitled to any copyright for that, would not destroy the value of the rest of his composition. He could not maintain a copyright action against anybody who copied the figure of Stalacta, because he had no right to copyright the figure of Stalacta by itself; but the mere insertion of that figure there as part of the original composition would not prejudice his right to a copyright for such composition. But in order to obtain such copyright he must have produced something new; his work as a whole must be an original composition and an original treatment of the subject. It will be for you to determine that question.

"If you determine that question in the affirmative, the only other question that remains for you to decide is as to what the damages are. I do not know of any other question in this case. There is no other defense that I know of. There were found in the room or shop of the defendants 1,440 copies in black and white and 635 copies colored. If you find that Exhibit D is a proper subject of copyright, I do not see how you can escape the conclusion that the black

and white, which is a reproduction exactly of it, without the colors, is an infringement. However, it will be a question for you to determine whether it is or is not an infringement of the copyrighted picture. If you find that it is, you will then find a verdict in favor of the plaintiff for $2,075, besides the sheets. Of this recovery of course you will understand the United States gets a half.

"You are dealing with the question not as a question of compensation to the owner of the copyright for what he may have lost. This is a quasi penal statute. The United States has made a law, and has forbidden the violation of that law, and has inflicted a penalty for its transgression. You have no scope, you have no choice in the matter. The only damages which you can give are the damages which the statute says you may give, and without any limitation whatever one way or the other; without any opportunity, I mean, of shifting the amount one way or the other. You must give one dollar for each sheet that is found there. The Government will take half and the plaintiff the other half.

"If, then, you reach the conclusion that this is an original composition, and that therefore the copyright communication which the plaintiff sent on to Washington really gave him a copyright—and reach the conclusion that the black and white reproduction was an infringement, as the 635 colored reproductions undoubtedly are—your verdict will be for the sheets and $2,075. On the other hand, if you reach the conclusion that there is no originality in Exhibit D, and that it was not a subject for a copyright, your verdict will be for the defendants."

The jury found for plaintiff. On writ of error to the Circuit Court of Appeals, the judgment was affirmed (119 *Fed. Rep., page* 374), the court using this language:

"The principal question of fact raised upon the trial related to the artistic quality of the production, which was submitted to the jury in a manner with which the plaintiff in error was apparently satisfied, and to which no exception was taken, and about which no question now properly arises."

APPENDIX C, referred to in page 43.

Added to Brief for Plaintiffs in Error,
in Bleistein and others vs. Donaldson Lithograph Co.

THE JOINT STOCK ASSOCIATION LAW,

of the State of New York.

(Laws of 1894, Chapter 235).

"An Act in relation to joint stock associations, constituting chapter forty-five of the general laws," as amended.

Short title.

Section 1. This chapter shall be known as the joint stock association law.

Definitions.

Sec. 2. As used in this chapter, the term joint stock association includes every unincorporated joint stock association, company or enterprise having written articles of association and capital stock divided into shares, but does not include a corporation; and the term stockholder includes every member of such an association.

Contents of articles of association.

Sec. 3. The articles of association of a joint stock association may:

1. Provide that the death of a stockholder thereof or the transfer of his shares of stock therein, shall not work a dissolution of the association.

2. Prescribe the number of its directors, not less than three, to have the sole management of its affairs.

3. Contain any other provision for the management of its affairs, not inconsistent with law.

Certificate to be filed within sixty days and annually thereafter; penalty; evidence.

Sec. 4. Every joint stock association transacting business within this state shall, within sixty days after its formation, and in each January thereafter, file with the secretary of state, and with the clerk of the county in which its principal business is carried on, a written certificate, signed and verified by its president and treasurer, stating the name and date of organization of such association, the number of its stockholders, the names and places of residence of its officers, and its principal place of business. Such certificates shall be recorded in such offices respectively. Any such certificate, the record thereof, or a certified copy of such certificate or record, shall be presumptive evidence of the truth of all facts therein stated, against such association, its officers and stockholders. The officers of a joint stock association who fail to comply with the provisions of this section shall be jointly and severally liable to pay to the people of this state a penalty of fifty dollars for each day such failure continues.

Dissolution:

Sec. 5. A joint stock association shall not be dissolved except in pursuance of its articles of association, or by consent of all its stockholders, or by judgment of a court for fraud in its management, or for good cause shown.

Power to take and convey real property.

Sec. 6. A joint stock association in the name of its president, as such president, may purchase, take, hold and convey such real property only,—

1. As may be necessary for its immediate accommodation in the convenient transaction of its business.

2. As may be mortgaged to it in good faith by way of security for loans made by or moneys due to it.

3. As it may purchase at sales under judgments, decrees or mortgages held by it.

Changing articles of association.

Sec. 7. (This section need not be quoted.)

When officer or stockholder not privileged from testifying.

Sec. 8. (This section need not be quoted.)

Laws repealed.

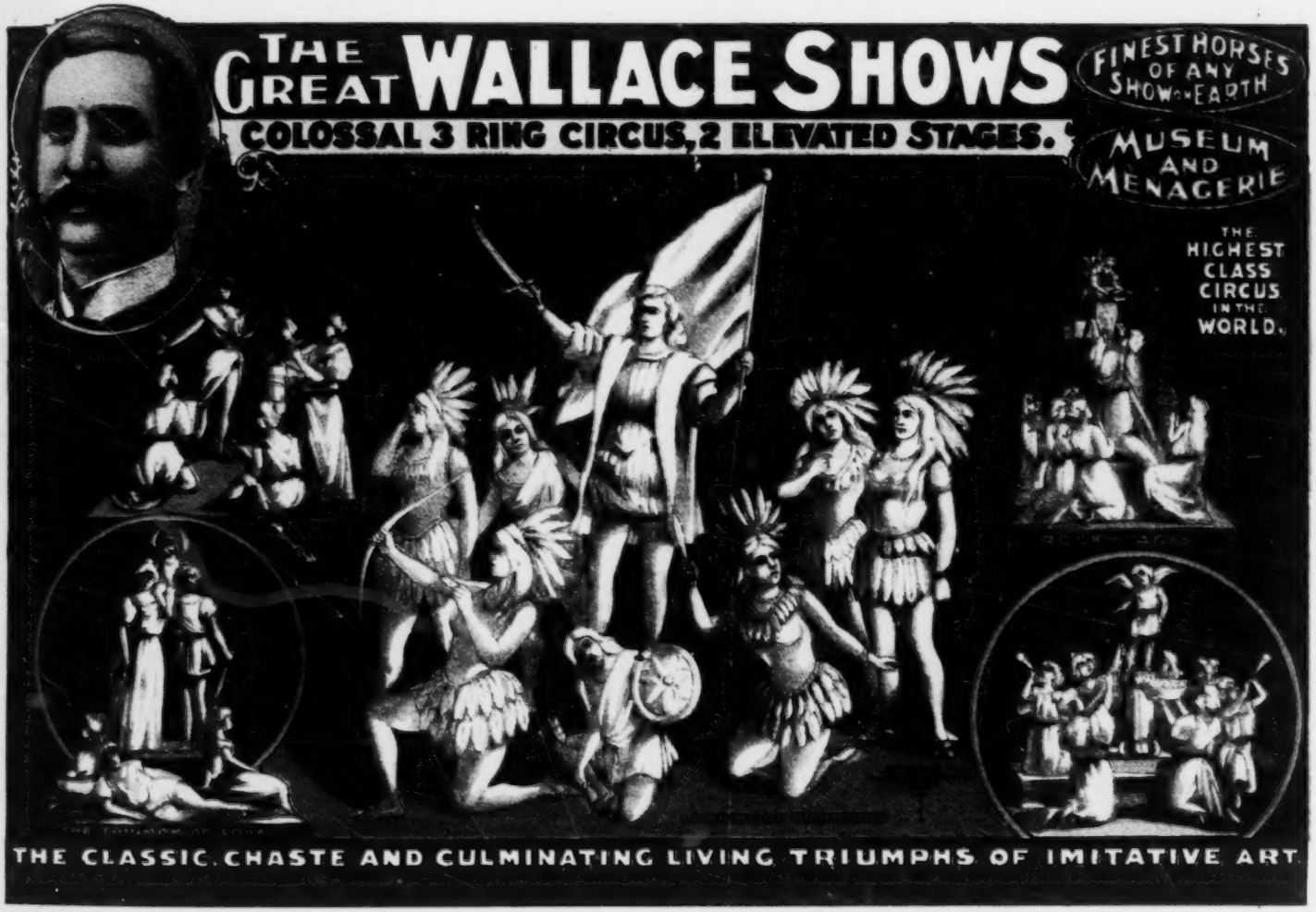
Sec. 9. (This section need not be quoted.)

Sec. 10. This act shall take effect immediately.

Relative to actions, et cetera, by or against associations of seven or more persons.

Sec. 1919. An action or special proceeding may be maintained, by the president or treasurer of an unincorporated association, consisting of seven or more persons, to recover any property, or upon any cause of action, for or upon which all the associates may maintain such an action or special proceeding, by reason of their interest or ownership therein, either jointly or in common. An action may likewise be maintained by such president or treasurer to recover from one or more members of such association his or their proportionate share of any moneys lawfully expended by such association for the benefit of such associates, or to enforce any lawful claim of such association against such member or members. An action or special proceeding may be maintained, against the president or treasurer of such an association, to recover any property, or upon any cause of action, for or upon which the plaintiff may maintain such an action or special proceeding, against all the associates, by reason of their interest or ownership, or claim of ownership therein, either jointly or in common, or their liability therefor, either jointly or severally. Any partnership, or other company of persons, which has a president or treasurer, is deemed an association within the meaning of this section.

(Code of Civil Procedure, Sec. 1919, as amended by L. 1900, ch. 184.)


THE GREAT WALLACE SHOWS
COLOSSAL 3 RING CIRCUS, 2 ELEVATED STAGES.
FINEST HORSES OF ANY SHOW ON EARTH
MUSEUM AND MENAGERIE
THE HIGHEST CLASS CIRCUS IN THE WORLD.
THE CLASSIC, CHASTE AND CULMINATING LIVING TRIUMPHS OF IMITATIVE ART

THE GREAT WALLACE SHOWS
COLOSSAL 3 RING CIRCUS, 2 ELEVATED STAGES.
FINEST HORSES OF ANY SHOW ON EARTH
MUSEUM AND MENAGERIE
THE HIGHEST CLASS CIRCUS IN THE WORLD
STIRK FAMILY
THE RENOWNED STIRK FAMILY.

THE GREAT WALLACE SHOWS
FINEST HORSES OF ANY SHOW ON EARTH
COLOSSAL 3 RING CIRCUS, 2 ELEVATED STAGES.
MUSEUM AND MENAGERIE
THE HIGHEST CLASS CIRCUS IN THE WORLD.
GREAT WALLACE SHOWS GRAND SPECTACULAR BALLET COSTUMED & PRESENTED EXACTLY AS IN GRAND OPERA, LED BY THE CELEBRATED SISTERS MACCARI, HULDA, ADELE & AMELIA PREMIERE DANSEUSES, A TREMENDOUS SENSATION COSTING A FORTUNE TO PRODUCE